

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NANCY QUON,)	Case No.: 2:11-cv-00967-GMN-PAL
)	
Plaintiff,)	ORDER
vs.)	
)	
STATE FARM FIRE AND CASUALTY)	
COMPANY,)	
)	
Defendant.)	
)	

Before the Court is Plaintiff Nancy Quon's Motion to Remand (ECF No. 9). Defendant State Farm Fire and Casualty Company filed a Response on June 29, 2011 (ECF No. 14) and Plaintiff filed a Reply on July 11, 2011 (ECF No. 19).

For the following reasons the Court GRANTS Plaintiff's Motion to Remand (ECF No. 9).

FACTS AND BACKGROUND

Plaintiff filed her Complaint in the Eighth Judicial District Court for the State of Nevada on June 2, 2011. Defendant removed this case to the United States District Court on June 13, 2011. (ECF No. 1). Defendant claimed diversity of citizenship as the basis for its removal. (*Id.*) Defendant later filed an Amended Petition for Removal claiming a federal question as an additional basis for subject matter jurisdiction. (ECF No. 13).

Plaintiff's Complaint seeks declaratory relief asking the Court to determine if Defendant is entitled to unlimited examinations under oath (EUOs) and if so whether Defendant is required to provide information to its insured why such additional EUOs are appropriate. Plaintiff's entire prayer for relief only requests a declaratory judgment finding that (1) Plaintiff has fulfilled her obligation under the contract to submit to an EUO, (2) Plaintiff has no further obligation to submit to any additional EUOs and (3) Plaintiff is entitled to Defendant's

1 investigative materials and evidence supporting Defendant's reservation of rights.

2 **DISCUSSION**

3 **A. Legal Standard**

4 A party may make a motion to remand "on the basis of any defect other than lack of
5 subject matter jurisdiction ... within 30 days after the filing of the notice of removal under
6 section 1446(a)." However, Section 1447 states: "[i]f at any time before final judgment it
7 appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28
8 U.S.C. § 1447(c). There is no discretion with the Court to hear matters over which the Court
9 has no jurisdiction.

10 District courts have original jurisdiction over civil actions where no plaintiff is a citizen
11 of the same state as a defendant and the amount in controversy exceeds \$75,000. 28 U.S.C. §
12 1332(a). Further, federal district courts have original jurisdiction founded on claims or rights
13 that arise under the Constitution, treaties or laws of the United States. 28 U.S.C. § 1331. A
14 civil action brought in state court may be removed by the defendants to a federal district court if
15 the district courts have original jurisdiction over the matter. 28 U.S.C. § 1441(a). The party
16 seeking removal bears the burden of showing that removal is proper. *Emrich v. Touche Ross &*
17 *Co.*, 846 F.2d 1190, 1195 (9th Cir.1988). Additionally, there is a strong presumption against
18 removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992).

19 **B. Analysis**

20 **1. Diversity of Citizenship**

21 Defendant removed this suit claiming Plaintiff is a Nevada citizen, Defendant is an
22 Illinois citizen and the amount of the fire insurance policy covering Plaintiff's home exceeds
23 \$75,000.00. Defendant argues that Plaintiff's claims for declaratory relief are with respect to
24 whether she has satisfied her obligations under the insurance policy. The proceeds of the
25 insurance policy to which Plaintiff may be entitled exceeds \$300,000.00. Thus, Defendant

1 argues that the amount in controversy is satisfied.

2 Plaintiff argues that her complaint does not request any monetary amount and as such
3 the amount in controversy is not facially apparent. Plaintiff is not seeking declaratory relief
4 that she is entitled to the proceeds under the policy nor is she making any claims against the
5 proceeds under the policy. Plaintiff is only seeking to determine if she has fulfilled her
6 obligations under the policy.

7 Defendant argues that Plaintiff's admission that the instant action was necessary to
8 "facilitate an effective resolution of her claim under the policy" demonstrates that the object of
9 this litigation is the insurance policy which has a limit of \$300,000. In a declaratory judgment
10 action regarding an insurance contract, "the amount in controversy is determined by assessing
11 the value of the underlying legal claims for which insurance coverage is sought." *State Farm*
12 *Fire & Casualty Company v. Corry*, 324 F.Supp. 2d 666,670 (E.D.Pa. 2004) (citations
13 omitted). *See also Travelers Ins. Co. v. Young*, 18 F.Supp. 450 (D.NJ. 1937)(the test of
14 jurisdiction is the maximum amount for which the insurer may be liable under the policy); *New*
15 *Century Casualty Co. v. Chase*, 39 F. Supp. 768, 771 (S.D.W.V. 1941)("The amount in
16 controversy in proceedings for declaratory judgment, where an automobile liability insurance
17 policy is involved, the general rule, is the maximum amount per which the company could be
18 held liable under the terms of the policy."). However, the cases cited by the Defendant are
19 distinguishable from the facts of this case. In the other cases, there already existed an
20 underlying suit filed against the insurance policy. In this case, Plaintiff has not filed a suit
21 against State Farm for any proceeds from the policy.

22 As it appears there are no Ninth Circuit cases that support Defendant's arguments,
23 Defendant only cites to other jurisdictions for its arguments. However, they are either factually

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1 distinguishable or are not consistent with Ninth Circuit precedent.¹

2 In the Ninth Circuit “[i]n actions seeking declaratory or injunctive relief, it is well
3 established that the amount in controversy is measured by the value of the object of the
4 litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). The amount must be
5 established by “the value of the particular and limited thing sought to be accomplished by the
6 action.” *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir.1944); *see also Hunt v.*
7 *Washington State Apple Advertising Comm’n*, 432 U.S. 333, 347, 97 S.Ct. 2434, 2443 (1977).
8 In this case the particular thing to be sought is a determination of whether or not submitting to
9 another EUO is reasonable. Plaintiff is not asking the Court for a determination of whether or
10 not she is entitled to the proceeds of the insurance policy. Thus, the Court finds that the
11 insurance policy limit of \$300,000.00 is not the measure of the controversy in this case and
12 therefore the amount in controversy requirement is not satisfied.

13 2. Federal Question

14 Defendant next argues that that the Court has jurisdiction under 28 U.S.C. § 1331 as
15 there is an issue “arising under the Constitution, laws or treaties of the United States.” Without
16 requesting leave to amend, Defendant amended its Petition for Removal to include a claim that
17 this Court has federal question subject matter jurisdiction over Plaintiff because she is choosing
18 to invoke her Fifth Amendment right by avoiding another EUO. Plaintiff does allege in both
19 her Complaint and the TRO that she has a Fifth Amendment right not to participate in any
20 further examinations under oath. Thus, Defendant argues that determining whether or not
21 Plaintiff must submit to further EUOs necessarily hinges on the Court’s “construction of the
22 Constitution.” *Starin v. New York*, 115 U.S. 248, 257 (1885).

23 The presence or absence of federal-question jurisdiction is generally governed by the
24

25 ¹ Likewise, Defendant argues that since Plaintiff has sought injunctive relief, that amount in controversy is the policy limits. For similar reasons given here, the Court is not persuaded by Defendant’s arguments.

1 “well-pleaded complaint rule,” which provides that “federal jurisdiction exists only when a
2 federal question is presented on the face of the plaintiff’s properly pleaded complaint.”
3 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule makes the plaintiff the master
4 of his complaint and permits him to avoid federal jurisdiction by relying exclusively on state
5 law. *Id.* Thus, federal question jurisdiction is ordinarily determined from the face of the
6 plaintiff’s complaint. *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997).

7 The “artful pleading doctrine” provides a narrow corollary to the well-pleaded complaint
8 rule. Under this doctrine, a plaintiff may not avoid federal jurisdiction by omitting from the
9 complaint allegations of federal law that are essential to the establishment of his claim. *Lippitt*
10 *v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003). The artful
11 pleading doctrine permits courts to “delve beyond the face of the state court complaint” and
12 find federal question jurisdiction by recharacterizing a state-law claim as a federal claim. *Id.*
13 The Ninth Circuit has cautioned, however, that courts should invoke the artful pleading
14 doctrine “only in limited circumstances.” *Id.* (quoting *Sullivan v. First Affiliated Securities,*
15 *Inc.*, 813 F.2d 1368, 1373 (9th Cir. 1987)). Accordingly, application of the artful pleading
16 doctrine is normally limited to two types of cases: (1) those involving complete preemption;
17 and (2) cases in which “a substantial, disputed question of federal law is a necessary element
18 of...the well-pleaded state claim,” or where the right to relief depends upon resolution of a
19 substantial, disputed federal question. *Lippitt*, 340 F.3d at 1042-43.

20 Plaintiff’s well-pleaded complaint does not establish federal question jurisdiction. At
21 one point in the complaint, Plaintiff alleges that she requested a delay of the EUO until after the
22 criminal investigation of Plaintiff was concluded, such that she would not need to choose
23 between her Fifth Amendment rights and coverage under the policy. Under the two causes of
24 action, Plaintiff does not ask the Court to determine whether or not she must submit to an EUO
25 in violation of her Fifth Amendment rights. Plaintiff instead asks for a determination of the

1 “reasonableness” of submitting to another EUO and to declare that she has already fulfilled her
 2 obligations under the policy by submitting to an EUO. Thus, under the well-pleaded complaint
 3 rule, Plaintiff has not invoked federal question jurisdiction.

4 Likewise, the artful pleading doctrine does not bring this into the realm of federal
 5 question jurisdiction. Plaintiff has not sought to avoid federal jurisdiction by omitting from the
 6 complaint allegations of federal law that are essential to the establishment of her claim.
 7 Plaintiff’s unequivocal right to invoke the Fifth Amendment against self-incrimination is not in
 8 issue and will not determine whether the circumstances surrounding the request for a second
 9 EUO is reasonable. At best, the invocation of the Fifth Amendment as a reason to delay the
 10 EUO is a corollary issue to be looked at with the remaining facts contributing to the actual
 11 issue: the reasonableness of the request for a second EUO.

12 **3. Judicial Estoppel**

13 Finally, Defendant argues that Plaintiff is judicially estopped from making the argument
 14 that her claims are for less than \$300,000. Judicial Estoppel applies when: (1) the same party
 15 has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative
 16 proceedings; (3) the party was successful in asserting the first position ... ; (4) the two positions
 17 are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud,
 18 or mistake. *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. Adv. Rep. 22 at 18 (2011)
 19 citing *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658,663 (2004)(additional
 20 citations omitted).

21 In her Motion for TRO, Plaintiff claimed the TRO was necessary to protect “her rights
 22 to the proceeds of her insurance policy.” The claimed proceeds of the policy exceed \$300,000.
 23 The Motion and oral argument before the state court judge qualify as judicial proceedings.
 24 Plaintiff was successful in arguing this position since the TRO was issued and stated
 25 “Defendant is unreasonably forcing Plaintiff to submit to an additional Examination Under

1 Oath ... thereby forcing Plaintiff to choose between her Fifth Amendment right and her
2 insurance benefits.”

3 Defendant argues that since Plaintiff took the position at the TRO hearing that the TRO
4 was necessary to protect her rights to the insurance proceeds, it is totally inconsistent with her
5 Motion for Remand. However, the Court does not find that it is inconsistent. Plaintiff’s
6 objective in this litigation is a determination of the reasonableness of the EUO. The
7 determination of the reasonableness of the second additional EUO in turn has repercussions to
8 both parties, including whether or not it will be necessary for the Plaintiff to choose to invoke
9 the Fifth Amendment or if submitting to the first EUO satisfied Plaintiff’s duty under the
10 policy. Further, regardless of the result of the determination. Plaintiff’s right to the proceeds
11 under the policy will not be established. Whether Plaintiff has fulfilled all her duties under the
12 policy or not will not establish whether she has a right to the proceeds. Accordingly, Plaintiff is
13 not judicially estopped from making the argument that her claims are for less than \$300,000.

14 CONCLUSION

15 The party seeking removal bears the burden of showing that removal is proper and there
16 is a strong presumption against removal jurisdiction. Defendant has failed in its burden of
17 showing that there is either a federal question or diversity of citizenship with an amount in
18 controversy of more than \$75,000 which would give this court jurisdiction.

19 **IT IS HERBY ORDERED** that Plaintiff Nancy Quon’s Motion to Remand (ECF No.
20 9) is **GRANTED**.

21 DATED this 14th day of July, 2011.

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24 Gloria M. Navarro
25 United States District Judge